IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 12TH FEBRUARY 2007 / 23RD MAGHA 1928

MFA.No. 180 of 2006()

AGAINST THE ORDER IN WCC.285/2002 ON THE FILE OF THE COMMISSIONER FOR WORKMENS COMPENSATION, THRISSUR

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APPELLANT: SECOND OPPOSITE PARTY

THE ORIENTAL INSURANCE CO. LTD.,
THRISSUR, REP. BY ITS ADMINISTRATIVE OFFICER,
REGIONAL OFFICE, ERNAKULAM NORTH, KOCHI-18.

BY ADV. SRI.GEORGE CHERIAN (THIRUVALLA)

RESPONDENTS: APPLICANT

V.V.JOSE,
S/O.VAREED, VENATTUPARAMBIL,
P.O.CHENGALOOR, THRISSUR.

BY ADV. SRI.K.M.JAMALUDHEEN
SMT.LATHA PRABHAKARAN

THIS MISC. FIRST APPEAL HAVING COME UP FOR ADMISSION ON 12/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

M.F.A.NO.180 OF 2006 (A)

Dated this the 12 th day of February, 2007.

J U D G M E N T

Insurance company is challenging the order passed by commissioner for Workmen's Compensation, Thrissur granting a compensation of Rs.45,467/- to first respondent, claimant assessing loss of earning capacity at 15%. Ext.A3 disability certificate issued by the doctor, who was examined as AW1 shows percentage of disability at 7% and loss of earning capacity at 21%. The Commissioner did not accept Ext.A1 certificate. Instead loss of earning capacity was fixed at 15% and granted compensation. It is challenged in the appeal contending that even though an application was filed before the Commissioner to get first respondent examined by the Medical Board, it was not allowed and Commissioner assessed his own estimate of loss of earning capacity without any basis and therefore it is to be set aside.

2. The substantial question of law which arises in the appeal is whether the Commissioner was competent to disregard the percentage, disability and loss of earning capacity assessed by the medical practitioner and whether he is competent to assess the loss of earning capacity without the aid of another medical expert and that too rejecting the application for examining the claimant by a Medical Board.

3. Learned counsel appearing for petitioner and first respondent were heard.

4. Arguments of learned counsel appearing for petitioner was that when Section 4(1)(C) (ii) of Workmen's Compensation Act mandates that Commissioner has to fix the loss of earning capacity on the basis of the report of Medical practitioner and having found that Ext.A1 certificate issued by Ext.AW1 cannot be relied on, commissioner should have allowed the application filed by appellant to get first respondent examined by the Medical Board and therefore the award is unsustainable. Learned counsel appearing for first respondent argued that in fact it was first respondent who should have challenged the award as commissioner should have fixed the loss of earning capacity at 21% and especially when the Medical practitioner was examined and medical certificate was marked and no contra evidence was adduced and in such circumstances in the appeal filed by the insurance company, the case may not be remanded, especially when case was pending before the commissioner from 2002 onwards.

5. Section 4(1)(C)(ii) of the Act mandates that where permanent partial disablement results from the injury not specified in schedule (1), such percentage of compensation payable in the case of permanent total disablement is proportionate to the loss of earning capacity as assessed by the qualified medical practitioner. Therefore when a qualified medical practitioner assessed the percentage of loss of earning capacity, commissioner has to grant the compensation accepting the percentage of loss of earning capacity, except when the commissioner is not satisfied about

the correctness of the assessment made by the medical practitioner. If the commissioner finds that the percentage of disability assessed by the medical practitioner is unreliable then the only option available to the commissioner is to get the loss of earning capacity or disability can be assessed by another medical practitioner or medical board and to fix compensation in accordance with that assessment. The commissioner is not competent to fix the percentage of loss of earning capacity of his own ignoring such medical certificate. The position is settled by the Full Bench of this court in New India Assurance Company vs. Sreedharan (1995 (1) KLT 275). Full Bench on similar facts held;

> "But when the statute specifically postulated that the compensation to be awarded should be proportionate to the loss of earning capacity as assessed by the qualified medical practitioner, permanently caused by the injury, we cannot obviously overlook the legislature's intention in accepting and recognising the expert opinion of the medical practitioner. It is only the medical practitioner who can, in the circumstances of the case, assess the loss of earning capacity. It would certainly depend on the facts and circumstances of each case. To hold that the Commissioner can

> disregard it without calling for any other data would be doing violence to the statutory provision. Of course, on the basis of the evidence tendered before the Commissioner, if he finds that the medical certificate issued by the medical practitioner cannot be accepted, he can certainly refer the applicant to medical board for expert opinion and report. Without doing so, coming to a decision of his own based on the interested testimony of the applicant would not be justifiable. As it is always open to the Commissioner to send the applicant before a medical board, he can very well adopt that method in a case where he finds that the certificate issued by a qualified medical practitioner is found wanting or suffers from any infirmity".

In such circumstances the compensation awarded by the commissioner ignoring the assessment of the loss of earning capacity made by AW1 under Ext.A1, is unsustainable. The award is set aside. Workmen's Compensation Commissioner, Thrissur is directed to refer first respondent to the Medical Board of Medical College, Thrissur and award compensation in accordance with the assessment made by the Medical Board. Workmen's Compensation

Commissioner is directed to pass the award, as expeditiously as possible and at any rate within two months from the date of receipt of a copy of this order. If the compensation deposited by the appellant is more than the compensation fixed by the commissioner, appellant is entitled to withdraw the same and if it is insufficient, appellant is bound to deposit the balance amount.

M.SASIDHARAN NAMBIAR,
JUDGE.

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